NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

CHRISTOPHER BOUCHARD, Petitioner, v. J.T. SHARTLE, Respondents.	**Hon. Renée Marie Bumb** Civil No. 11-3273 (RMB) **OPINION**

APPEARANCES:

CHRISTOPHER BOUCHARD, #03754-049
F.C.I. Fairton
P.O. Box 420
Fairton, New Jersey 08320
Petitioner Pro Se

BUMB, District Judge

Christopher Bouchard, a federal inmate confined at FCI Fairton in New Jersey, filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241 seeking restoration of 40 days of good conduct time forfeited as a disciplinary sanction. For the reasons expressed below and because the face of the Petition and attachments show that Petitioner is not entitled to relief, this Court will summarily dismiss the Petition.

I. BACKGROUND

Petitioner challenges the loss of 40 days of earned good conduct time imposed by the Bureau of Prisons ("BOP") as a

disciplinary sanction while Petitioner was confined at FCI Fort Dix.

Petitioner executed the Petition on June 2, 2011. The Clerk received it on June 7, 2011. Petitioner asserts the following facts:

> On or about April 30, 2010 the reporting officer J. Ellis signed an Incident Report (I/R) No. 2009791 that concluded that Petitioner possessed a hazardous tool a cell phone charger a code 108 violation in the Federal Bureau of Prisons (F.B.O.P.) a Greatest Severity Level violation . . . . Petitioner never admitted that the contraband was His . . . . That resulted in the Petitioner losing 108 days of non vested good time and the disallowance of 40 days GCT among other sanctions. The Petitioner was charged with one Act, Possession of a Cell phone.

(Docket Entry #1, pp. 3-4.)

Petitioner further asserts that he exhausted the BOP's three-step Administrative Remedy Program. Attached to the Petition are the following documents: (1) Incident Report dated April 30, 2010; (2) Discipline Hearing Officer Report; (3) Regional Director's Response to Petitioner's appeal of the sanction, dated July 23, 2010; and (4) receipt dated January 6, 2011, indicating that the Administrative Remedy Coordinator of the BOP's Central Office received Petitioner's appeal on December 1, 2011, and that the response is due on January 10, 2011. (Docket Entry #1-1, pp. 1-6.)

The Incident Report charges Petitioner with a violation of Code 108, Possession, Manufacture, or Introduction of a Hazardous Tool: "On April 30, 2010 at approximately 7:10 pm while conducting a shake down of inmate Bouchards 03754-049 secure wall locker I located a samsung cell phone charger. The charger was altered with other wires and another connection. The phone charger was found inside of a sock on the top shelf of his locker." (Docket Entry #1-1, p. 1.)

After conducting a hearing on May 7, 2010, the Disciplinary Hearing Officer found Petitioner guilty of code 108. Petitioner appealed, and on July 23, 2010, J.L. Norwood, Regional Director, denied the appeal as follows:

> You appeal the May 7, 2010 decision of the Discipline Hearing Officer (DHO) at FCI Fort Dix, finding you committed the prohibited act of Possessing a Hazardous Tool (cell phone charger), Code 108, Incident Report No. 2009791. You contend the Bureau of Prisons (BOP) is misinterpreting Code 108, which is clearly defined and does not include a cell phone. You state the BOP has circumvented the Administrative Procedures Act and there is insufficient notice of this violation. You argue that you are being denied equal protection by having greater sanctions imposed than for a code 305, the more appropriate charge.
>
> In your appeal, you do not deny that a Samsung cell phone charger was found in your secured wall locker, hidden inside a sock on April 30, 2010. At the DHO hearing, you stated you keep your locker unlocked all the time and implied someone put the charger in your locker. The DHO also considered staff memoranda and a photograph of the charger.

> You are responsible for securing your personal property and for all contraband found in your assigned areas. You did not present any evidence the cell phone charger belonged to someone else and the DHO reasonably determined you possessed contraband hazardous to institution security. Although you believe you were charged with the wrong offense code, by memorandum dated December 28, 2009, the Warden at FCI Fort Dix advised the inmate population than an inmate found in possession of electronic communication devices or related equipment such as cellphones, chargers, video equipment, etc., may be charged with a violation of Code 108. We concur with this decision and find you were appropriately charged and sanctioned.
>
> The record in this case reflects substantial compliance with Program Statement 5270.08, Inmate Discipline. The decision of the DHO was based upon the greater weight of the evidence and the sanctions imposed were consistent with the severity level of the prohibited act. The sanctions imposed: 60 days disciplinary segregation, disallow 40 days god conduct time, forfeit 108 days non-vested good conduct time, 18 months loss of telephone privileges and 90 days loss of commissary and visiting privileges, were not disproportionate to your misconduct. Accordingly, your appeal is denied.

(Docket Entry #1-1, p. 4.)

Petitioner submitted an appeal to the Administrative Remedy Coordinator at the BOP's Central Office, which received the appeal on December 1, 2010. (Docket Entry #1-1, p. 6.) To date, Petitioner has received no response.[1]

[1] If the appeal was not received until December 1, 2010, it may be untimely, as the Regional Director's decision states that (continued...)

In the Petition before this Court Petitioner argues : (1) the BOP violated due process because at the disciplinary hearing Petitioner denied that the cell phone charger was his; (2) because "a phone charger can never be a hazardous tool" (Docket Entry #1, p. 5), the BOP abused its discretion by finding him guilty of code 108, Possession, Manufacture, or Introduction of a hazardous tool, when the proper charge was code 305, Possession of Anything Not Authorized; and (3) the BOP violated equal protection by failing to reduce his charge to code 305 when it reduced the charges of two other inmates for possession of a cell phone. Petitioner seeks a writ directing the BOP to restore the 40 days of good conduct time or to reduce the sanction to that for a code 305 violation. (Docket Entry #1, pp. 6-7.)

II. DISCUSSION

A. Jurisdiction

Under 28 U.S.C. § 2241(c), habeas jurisdiction "shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A federal court has subject matter jurisdiction under § 2241(c)(3) if two requirements are satisfied: (1) the petitioner is "in custody" and (2) the custody is "in violation of the Constitution or laws or treaties

---

[1](...continued)
the appeal must be received in the Central Office within 30 calendar days of July 23, 2010.

of the United States." 28 U.S.C. § 2241(c)(3); Maleng v. Cook, 490 U.S. 488, 490 (1989). The federal habeas statute requires that the petitioner be in custody "under the conviction or sentence under attack at the time his petition is filed." Lee v. Stickman, 357 F.3d 338, 342 (3d Cir. 2004) (quoting Maleng, 490 U.S. at 490-91). This Court has subject matter jurisdiction under § 2241 to consider the instant Petition because Petitioner challenges the loss of good conduct time on federal grounds, and he was incarcerated in New Jersey at the time he filed the Petition. See Queen v. Miner, 530 F. 3d 253, 254 n.2 (3d Cir. 2008); Woodall, 432 F.3d at 242-44.

B. Standard of Review

"Habeas corpus petitions must meet heightened pleading requirements." McFarland v. Scott, 512 U.S. 849, 856 (1994). Habeas Rule 2(c) requires a habeas petition to "specify all the grounds for relief available to the petitioner," "state the facts supporting each ground," "state the relief requested," be printed, typewritten, or legibly handwritten, and be signed under penalty of perjury. 28 U.S.C. § 2254 Rule 2(c), applicable to § 2241 through Rule 1(b). Habeas Rule 4 requires a judge to sua sponte dismiss a petition without ordering a responsive pleading "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." 28 U.S.C. § 2254 Rule 4, applicable to § 2241

through Rule 1(b). Thus, "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face." McFarland, 512 U.S. at 856. Dismissal without the filing of an answer has been found warranted when "it appears on the face of the petition that petitioner is not entitled to relief." Siers v. Ryan, 773 F.2d 37, 45 (3d Cir. 1985), cert. denied, 490 U.S. 1025 (1989); see also McFarland, 512 U.S. at 856; United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) (habeas petition may be dismissed where "none of the grounds alleged in the petition would entitle [the petitioner] to relief").

C. Due Process

Petitioner argues that the BOP violated due process by revoking his good conduct time credits without sufficient evidence that he was guilty of Possession, Manufacture, or Introduction of a Hazardous Tool, because he denied that it was his.

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Federal inmates possess a liberty interest in good conduct time. See Wolff v. McDonnell, 418 U.S. 539, 555-57 (1974); Young v. Kann, 926 F. 2d 1396, 1399 (3d Cir. 1991); Levi v. Holt, 192 Fed. App'x. 158 (3d Cir. 2006).

Where a prison disciplinary hearing results in the loss of good conduct time, due process requires: (1) 24 hours advance written notice of the disciplinary charges; (2) a hearing with the right to testify, call witnesses and present documentary evidence, when not unduly hazardous to correctional goals; and (3) a written statement by the factfinder as to the evidence relied on and reasons for the disciplinary action. See Wolff, 418 U.S. at 564-566. In addition to the requirements of Wolff, "revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary [officer] are supported by some evidence in the record." Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454 (1985) (citations and internal quotation marks omitted); see also Griffin v. Spratt, 969 F.2d 16, 19 (3d Cir. 1992); Thompson v. Owens, 889 F.2d 500, 501 (3d Cir. 1989). The Supreme Court explained the "some evidence" standard in this passage of Hill:

> We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if there was some evidence from which the conclusion of the administrative tribunal could be deduced. Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary

> [officer]. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context.

Hill, 472 U.S. at 455-456 (citations and internal quotation marks omitted); see also Thompson, 889 F.2d 500.

"The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." Hill, 472 U.S. at 455-56. For example, in Hill, the Supreme Court reversed the state court's determination that the evidence of a disciplinary infraction was constitutionally deficient because it did not support an inference that more than one person had assaulted the victim; the Supreme Court held that the evidence before the disciplinary board satisfied the "some evidence" standard:

> The disciplinary board received evidence in the form of testimony from the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates

> fleeing together down an enclosed walkway. No other inmates were in the area . . . .
>
> The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. Although the evidence in this case might be characterized as meager, and there was no direct evidence identifying any one of the three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary.

Hill, 472 U.S. at 455-457 (citations omitted).

Similarly, in Santiago v. Nash, 224 Fed. App'x 175, 177 (3d Cir. 2007), Santiago brought a § 2241 petition challenging the loss of good conduct time where he was found guilty of possession of a hazardous tool after a guard found a tattoo gun needle taped to the frame of Santiago's bunk. At the disciplinary hearing, Santiago denied knowledge of the needle and claimed there was insufficient evidence to find that he possessed the needle. The Third Circuit rejected the argument:

> We agree with the District Court that some evidence existed to support the DHO's conclusions. Although Santiago argues that he had no knowledge of the needle's presence, it was found within an area that Santiago was responsible for keeping contraband-free. Further, in the absence of direct evidence indicating an inmate's guilt of possession, the 'some evidence' standard may be satisfied by application of the constructive possession doctrine in limited circumstances where a

> small number of inmates are potentially guilty of the offense charged.

Santiago v. Nash, 224 Fed. App'x at 177 (citations omitted); accord Reynolds v. Williamson, 197 Fed. App'x 196 (3d Cir. 2006) (where habeas petitioner shared cell with another inmate and corrections officer found a 10-inch sharpened rod in the sink drain of the cell and petitioner denied knowledge of weapon and did not have the necessary plumbing tools to retrieve the hidden shank from the drain, Third Circuit held that there was some evidence that he possessed the shank).

In this case, the undisputed fact that the cell phone charger was found in Petitioner's locker provided some evidence that Petitioner possessed the charger. Compare Hill, 472 U.S. at 455-457 (where three inmates could have assaulted victim, there was some evidence that Hill was the assailant); Shelby v. Whitehouse, 399 Fed. App'x 121 (7th Cir. 2010) (where Shelby shared cell with four other inmates and one inmate had admitted that drugs found in the cell were his, disciplinary decision finding Shelby guilty of possession was supported by "some evidence," since collective responsibility among prisoners is not unconstitutional); Flannagan v. Tamez, 368 Fed. App'x 586, 590 (5th Cir. 2010) (there was "some evidence" where "contraband was found in [cell] that Flannagan share[d] with only five other inmates"); Hamilton v. O'Leary, 976 F. 2d 341, 346 n.1 (7th Cir. 1992) (where the most likely scenario was that one in eight

prisoners had access to vent where weapons were found (12.5% probability) and the record before the disciplinary hearing board showed that there was a one in four probability, there was "some evidence" of petitioner's guilt of possession of weapon) with Broussard v. Johnson, 253 F. 3d 874, 877 (5th Cir. 2001) (where the only evidence that petitioner possessed bolt cutters was the fact that they were found in the kitchen where he worked, to which 100 inmates had access, the evidence was insufficient to satisfy "some evidence" standard). Because the weapon was found in Petitioner's locker, there was "some evidence" that he possessed the weapon, and the BOP did not deprive Petitioner of good conduct time credits without due process.[2]

D. Abuse of Discretion

Petitioner argues that the BOP abused its discretion by finding him guilty of Possession of a Hazardous Tool because a cell phone charger is not a hazardous tool.

BOP regulations authorize the BOP to impose sanctions when an inmate "is found to have committed a prohibited act." 28 C.F.R. § 541.13(a). Prohibited acts under BOP regulations include code 108, defined as follows: "Possession, manufacture, or introduction of a hazardous tool (Tools most likely to be used in an escape or escape attempt or to serve as weapons capable of

[2] Petitioner raises no other due process challenge and nothing before this Court indicates that the requirements of Wolf were not satisfied.

doing serious bodily harm to others; or those hazardous to institutional security or personal safety; e.g., hack-saw blade)." 28 C.F.R. § 541.13, Table 3.

Petitioner challenges the BOP's determination that a cell phone charger is a hazardous tool. The Regional Director explained that, "by memorandum dated December 28, 2009, the Warden at FCI Fort Dix advised the inmate population that an inmate found in possession of electronic communication devices or related equipment such as cell phones, chargers, video equipment, etc., may be charged with a violation of Code 108. We concur with this decision and find you were appropriately charged and sanctioned." (Docket Entry #1-1, p. 4.)

The BOP's interpretation of its own regulation is "controlling . . . unless it is plainly erroneous or inconsistent with the regulation." Chong v. Dist. Dir., I.N.S., 264 F. 3d 378, 389 (3d Cir. 2001). The BOP's definition of hazardous tool to include a cell phone charger is not plainly erroneous or inconsistent with BOP regulations. See Hicks v. Yost, 377 Fed. App'x. 223 (3d Cir. 2010) (BOP's definition of hazardous tool in code 108 to include a cell phone is not plainly erroneous or inconsistent with BOP regulations); McGill v. Martinez, 348 Fed. App'x 718 (3d Cir. 2009) (where officer found a cell phone and a charger in petitioner's cubicle, BOP did not violate due process or abuse its discretion in sanctioning him 40 days of good

conduct time for possession of hazardous tool, code 108); Robinson v. Warden, FCI Fort Dix, 250 Fed. App'x 462, 464 (3d Cir. 2007) ("The BOP's definition of a hazardous tool to include a cell phone is not plainly erroneous or inconsistent with BOP regulations, see Chong v. Dist. Dir., I.N.S., 264 F. 3d 378, 389 (3d Cir. 2001), and Robinson's conduct clearly falls within Code 108"); Ortiz v. Zickefoose, 2011 WL 1675003 (D.N.J. May 3, 2011) (denying habeas corpus relief who argued that possession of a cell phone was not violation of code 108). Under these circumstances, this Court rejects Petitioner's argument that the BOP abused its discretion in sanctioning him for a code 108 violation. Id.

E. Equal Protection

Petitioner asserts that the BOP violated his right to equal protection because it reduced the 108 code violation to a 305 code violation for inmates Hudson and Neagle, who also filed § 2241 petitions. This Court's docket shows that Duane E. Hudson filed a § 2241 petition challenging the loss of good conduct time for possession of a cell phone at FCI Fort Dix, in violation of code 108. See Hudson v. Zickefoose, 2010 WL 4746220 (D.N.J. Nov. 15, 2010). Judge Kugler found that the petition was rendered moot where the BOP re-sanctioned Hudson for committing a code 305 violation, but determined that, "even if the Petition has not been rendered moot . . . , Petitioner's challenges would be

subject to dismissal." Id. at *1 (citing Pittman v. Zickefoose, Civil No. 10-5057 (RMB) (D.N.J. closed Oct. 20, 2010)). Similarly, Christopher Neagle filed a § 2241 petition challenging the loss of 41 days of good conduct time for possession of a cell phone in violation of code 108. See Neagle v. Grondolsky, 2010 WL 2546021 (D.N.J. June 18, 2010). "Petitioner allege[d] that he was deprived of liberty without due process of law because he has lost good conduct days as a result of the sanctions imposed by being charged with a Code 108 infraction for the possession of a cell phone which carries stronger legal consequences than a Code 305 violation." Id. at *3. Although the BOP's answer indicated that it had reduced the infraction to a Code 305 violation, Judge Hillman dismissed the petition on the merits, finding that the BOP did not violate Petitioner's federal rights by sanctioning him for a code 108 violation.

The Equal Protection Clause requires that all people similarly situated be treated alike. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). A petitioner who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination that had a discriminatory effect on him. See McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Whitus v. Georgia, 385 U.S. 545, 550 (1967). "Thus, to prevail under the Equal Protection Clause, [Petitioner]

must prove that the decisionmakers in *his* case acted with discriminatory purpose." McCleskey, 481 U.S. at 292.

The problem with Petitioner's equal protection claim is that, other than alleging that the BOP reduced the severity of the disciplinary charge for cell phone possession in two other cases, he has alleged nothing to indicate that his disciplinary sanction was the result of purposeful discrimination. Accordingly, his equal protection claim fails. See Millard v. Hufford, 2011 WL 681091 (3d Cir. Feb. 28, 2011) ("Millard cited various cases in which inmates received less severe punishment for the same violation committed by Millard (possession of a weapon), arguing that because he received harsher punishment than other inmates for the same offense, the punishment must have been the result of discrimination . . . . Millard's argument falls well short of establishing the purposeful discrimination necessary to make out an equal protection claim").

As the Petition and attachments do not show that the final administrative decision violated the Constitution, laws or treaties of the United States, this Court will dismiss the Petition.

III. CONCLUSION

For the reasons set forth above, the Court dismisses the Petition for a Writ of Habeas Corpus.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: June 27, 2011